KONG TIONG WAH

v.

NG OH KIA

HIGH COURT MALAYA, MUAR
MAHADEV SHANKAR J
[CIVIL SUIT NO. 280 OF 1982]
15 FEBRUARY 1984

CIVIL PROCEDURE: *Application to set aside summary judgment - Costs.*

The plaintiff brought an action against the defendant for specific performance of an agreement for sale of land. In mid 1983 he filed an application for summary judgment. The hearing fixed to be held in September 1983 was postponed on the request of the defendant's solicitors. The matter came before the Court on 24 November 1983. A request for a further postponement was made by the defendant's solicitors but the application was refused and an order for summary judgment was made. The defendant's solicitors then applied for the matter to be relisted for further argument. They applied for the order for summary judgment to be set aside. The defendant filed affidavits in support of the application.

Held:

[1] In the circumstances of the case, the order of 24 November 1983, for summary judgment should be set aside. The affidavits filed by the defendant contained material which show a good defence to the plaintiff's case and which raise triable issues of law and fact. Where one party has not been heard at all, application to set aside must be sympathetically considered. Furthermore, it would not be just to preclude the defendant from the hearing merely because her solicitors had not been as energetic in her defence as the Court might have wished.

[2] However, the plaintiff should not be adversely affected in costs, as the situation leading to the summary judgment was brought about solely by the indolence of the defendant's solicitors.

[Application allowed. Costs against defendant. Defendant's solicitors to show cause why they should not repay the defendant such costs as she had been ordered to pay the plaintiff.]

Case referred to:
In re Harrison's Share Under the Settlement [1955] 1 Ch 260
Evans v. Bartlam [1937] AC 480

Legislation referred to:
Rules of the High Court 1980, O. 59 r. 8 (2)

For the plaintiff - K.S. Dass; M/s. Wong & Dass
For the defendant - Humprey Ball; M/s. Humprey Ball & Co.

JUDGMENT

Mahadev Shankar J:

This is an appeal against the order which I made on 7 December 1983 setting aside a previous order giving the plaintiff leave to enter summary judgment against the defendant and granting unconditional leave to defend this action. I also directed that there should be an early trial of this action. As to costs as I ordered that the cost thrown away and incurred in respect of the hearing on 24 November 1983 and 5 December 1983 and 7 December 1983 be taxed

and paid by the defendant to the plaintiff. I further ordered that the defendant's solicitors do appear on a date to be fixed to show cause as required by O. 59 r. 8(2) of the Rules of the High Court why they should not repay the defendant the costs she has been ordered by this Court to pay to the plaintiff.

Against this order the defendant has appealed and has requested for the grounds of judgment.

The history of this matter is as follows:

This action is one for specific performance of agreement for sale of land and for various consequential orders and alternative remedies by way of damages and special damages. I do not propose to set out in detail the averments which are alleged in the statement of claim and the other cause papers.

Suffice it to say that sometime in May and June 1983 the plaintiff had already filed the application for summary judgment and the affidavits in support and served these documents upon the defendant's solicitors.

Since that date there was a hearing fixed in September 1983 which did not take place because the defendant's solicitors applied for postponement on the ground that their Counsel, Mr. Ball was not available.

In September after this adjournment was granted, the parties were notified that the case would be proceeded with on 24 November 1983.

For reasons best known to themselves defendant's solicitors did not inform Mr. Ball that the case was for hearing on 24 November 1983.

Nor did the defendant's solicitors file any affidavits in opposition to the plaintiff's applications.

All that they did was that on 22 November 1983 they sent in a letter to this Court requesting yet another postponement on the ground that Mr. Ball was away in the Brunei High Court. In their letter they stated that the plaintiff's Counsel had no objection to the adjournment.

When the matter came before me on 24 November 1983 I dealt with it in Open Court.

The plaintiff was personally present and when the details of the application for the adjournment by the defendant were explained by the Court interpreter to the plaintiff he stated that he wished the case be proceed.

In all the circumstances of the case I refused the application for the adjournment.

I did this because it is my view that solicitors cannot by mutual consent force adjournments upon the Court and their clients. A postponement can only be granted by the Court for the good reason. And mutual consent of the solicitors on both sides is not enough.

What was apparent on 24 November 1983 was that the defendant's solicitors by their indolence had not taken the trouble to file the affidavits in opposition, and had not taken the trouble to notify Mr. Ball that the case was for hearing. Had they done so, I have no doubt that he would have proved all the necessary arrangement for the due disposal of the matter.

The defendant's solicitors' letter dated 22 November 1983 requesting an adjournment appeared to have been an 11th-hour attempt to avoid the result of a continued hearing.

I therefore ordered the plaintiff to proceed and I gave judgment as prayed.

Since then, the defendant's solicitors applied by letter for the matter to be relisted for further argument on the ground that as long as the order granting judgment had not been drawn up and entered it was open to the Court to review the position.

They applied to have the order made on 24 November, set aside and in support of this application the defendant has filed 2 affidavits.

In *re Harrison's Share Under the Settlement* [1955] 1 Ch 260 it was held that as long as an order has not been perfected the Court has the power to set aside in appropriate circumstances. The jurisdiction is a discretionary one which is to be exercised judicially and not capriciously.

In *Evan v. Bartlam* [1937] AC 480 it was held that it is a serious matter for the Court to shut out the defendant who has a good ground of defence from having a fair hearing and accordingly a breach of the rules of the procedure should not result in the exercise of the coercive powers of the Court except in the clearest cases.

The affidavits filed by the defendant since 24 November 1983 contained material which show a good defence to the plaintiff's claim and raise triable issues of law and fact. Furthermore there are serious charges in these affidavits against the solicitor who had the conduct of transaction and also against some of the other parties who filed the affidavits in support of the plaintiff's application. These raised serious questions to be tried at the hearing.

Where both parties have had a fair hearing, the Court would only exercise its power to set aside an order which has not been perfected in the rarest circumstances. But where one party has not been heard at all, as in this case, application to set aside must be sympathetically considered.

Furthermore, the affidavit on record show a good defence and it is my view in all the circumstances it would not be just to preclude the defendant from the hearing merely because her solicitors have not been as energetic in her defence as the Court might have wished.

I am satisfied that this is a case where in all circumstances the correct order to make is to set aside the previous order for summary judgment which was made on 24 November 1983.

Even though the defendant has succeeded in her application to set aside I held that the plaintiff should not be adversely affected in costs. The situation which arose on 24 November 1983 was brought about by the indolence of the defendant's solicitors and not by any fault on the part of the plaintiff.

I therefore ordered that the cost thrown away both for the hearing on 24 November 1983 and for 5 and 7 December 1983 be taxed and paid by the defendant's solicitors to the plaintiff.

It was pointed out to the Court by Mr. Ball that under the provision of O. 59 r. 8 the Court should not make an order that these costs be paid by the defendant's solicitor but that they should be given an opportunity to appear before me on a date to be fixed to show cause as provided by O. 59 r. 8(2) why they should not repay the defendant such costs as she had been ordered to pay under this order.

I accordingly made such an order and to date the defendant's solicitors have not yet appeared before me because although a notice of appeal was filed on 6 January 1984 the order made by the Court on 7 December 1983 does not appear to have been extracted.

Also found at [1984] 2 CLJ 49